United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-7295

To be Argued by
BARTON P. BLUMBERG

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

CHERYL PERRY HILL, THELMA LINDO, VICTORIA RAPHAEL, LURLINE RUTHERFORD and ANSONIA LEWIS, for themselves and all persons similarly situated,

Plaintiffs-Appellants,

-against-

A-T-O, INC., FAMILY BUYING POWER, INC., NATIONWIDE PROMOTIONS, INC., EXECUTIVE BUYING POWER, INC., COMPACT ASSOCIATES, INC., COMPACT BELLEROSE, INC., COMPACT ELECTRA CORP., HYMAN SINDELMAN a/k/a HY DELMAN, M. ROBERT DORTCH and FRANK DORTCH,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANTS-APPELLEES
FAMILY BUYING POWER, INC., NATIONWIDE PROMOTIONS, INC., EXECUTIVE BUYING POWER, INC., FAMILY CLEANING POWER, INC., M. ROBERT DORTCH AND FRANK DORTCH

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PREFACE

Plaintiffs' appeal from two Orders of Judge Walter Bruchhausen of the United States District Court for the Eastern District of New York. The first Order, dated March 5, 1975, granted defendants leave to reargue their motion for summary judgment and upon such reargument the Court below granted summary judgment dismissing the Amended Complaint. The second Order, dated April 11, 1975, denied plaintiffs' motion for leave to reargue and the Court below affirmed its prior decision.

This Memorandum is submitted on behalf of defendants-appellees Family Buying Power, Inc., Nationwide Promotions, Inc., Executive Buying Power, Inc., Family Cleaning Power, Inc., M. Robert Dortch and Frank Dortch (hereinafter collectively referred to as the "FBP defendants").

Plaintiffs, on November 30, 1973, were granted leave to proceed in forma pauperis in the District Court. This appeal will be heard on the original record without the necessity of an appendix. Plaintiffs have prepared an index to all papers in the record with numbers 1 through 93 corresponding to the order of the documents in the record. Therefore, references to the record in this brief will use the index number. For example, plaintiffs' Complaint is index number 2 so it will be found at "I-2". A copy of the index to the record is attached as an addendum to plaintiffs' brief and is incorporated herein by reference.

STATEMENT OF THE CASE

This class action under the Federal Anti-Trust Laws, 15 U.S.C.A. §1, was commenced by the filing of the summons and complaint on or about December 3, 1973 and the service of same upon the defendants at various times between December 14, 1973 and January 14, 1974. All of the defendants including FBP defendants, during March, 1974, moved to dismiss the complaint pursuant to F.R.C.P. Rule 12(b)(6) and plaintiffs then cross-moved for a leave to serve an Amended Complaint, asserting that the Amended Complaint would cure technical objections, urged by the defendants in their motion, as well as deleting certain objectionable material from the complaint. The Court below in an opinion dated June 19, 1974 granted plaintiffs' motion to amend their complaint and denied defendants' motion to dismiss the complaint.

The Amended Complaint (Amend. Compl. I-19) consists of two causes of action, the gravamen of which is that the defendants schemed and conspired to enter into an illegal tying arrangement violative of Section 1 of the Sherman Anti-Trust Act pursuant to which plaintiffs were fraudulently induced to purchase an inferior vacuum cleaner (the "tied product") at an exorbitant price by tying such sale to a promotional arrangement whereby an annual membership in a buying service (the "tying product") in the FBP defendants was included in the sale. In addition thereto, plaintiffs further allege that the defendants combined and conspired by certain allegedly fraudulent sales practices to

unreasonably restrain interstate trade or commerce in the door-to-door sale of vacuum cleaners in the lower socio-economic markets which practices plaintiffs allege are sufficient to violate Section 1 of the Sherman Anti-Trust Act.

The Amended Complaint was served on or about May 10, 1974 and all of the defendants answered during the month of July, 1974. The answers essentially denied the material allegations of the Amended Complaint and asserted, as affirmative defenses, the legal insufficiencies of the Amended Complaint.

On or about September 23, 1974, defendant, ATO, Inc., moved to dismiss plaintiffs' jury demand pursuant to F.R.C.P. Rule 38(b) and on or about October 1, 1974 plaintiffs cross-moved pursuant to F.R.C.P. Rule 23(b) for an order requesting "that this action may proceed as a class action on behalf of a sub-class consisting of all persons who purchased or received a 'buying service' operated..." by the FBP defendants "...together with a vacuum cleaner manufactured by defendant, ATO, Inc., from either Compact Electra Corp., Compact Discount, Inc., Compact Associates, Inc., Compact Bellerose, Inc., or Hyman Sindelman during the period from March 20, 1969 to December 3, 1973;...". These motions were adjourned to December 11, 1974.

During the month of October, 1974, plaintiffs served interrogatories upon the FBP defendants and answers or objections to the same have been submitted to the plaintiffs.

On or about November 29, 1974 defendant Hyman Sindelman and several companies affiliated with said defendant moved for summary judgment pursuant to F.R.C.P. Rule 56 and in addition thereto, requested: (i) a stay of proceedings; and (ii) an order striking plaintiffs' jury demand. Similarly, the FBP defendants by notice of motion dated December 2, 1974 moved for summary judgment dismissing the Amended Complaint which motion was joined in by defendant ATO, Inc.

The Court below, in its Memorandum and Order, dated January 21, 1975 granted plaintiffs' motion for class action certification and denied defendants' motions for summary judgment and the ancillary relief requested therein. Thereafter, all of the defendants properly moved for leave to reargue the lower Court's decision of January 21, 1975. The Court below by Order dated March 5, 1975 granted defendants' motion for reargument and upon such reargument granted defendants summary judgment dismissing the Amended Complaint.

Plaintiffs by motion dated March 14, 1975 moved for leave to reargue and requested leave to amend the Amended Complaint and their 9(g) statement. As part of such motion, without requesting leave of the Court to submit additional papers, plaintiffs submitted additional affidavits. The lower Court by Order dated April 11, 1975, denied plaintiffs' request for reargument. Plaintiffs then filed a notice of appeal to this Court on April 16, 1975.

PARTIES

Plaintiffs consist of individuals who have legedly been damaged by "purchasing or receiving" a membership in a buying service owned and operated by the FBP defendants in conjunction with the sale of a vacuum cleaner manufactured by ATO, Inc.

The FBP defendants own and operate a quotation and buying service (the "buying service") through which members who pay an annual membership fee of $12.00, obtain a catalogue and quotation sheets which permit such members to acquire merchandise at a discount price below the retail price for said merchandise.

Defendant, ATO, Inc. owns and operates as a division interstate engineering (hereinafter collectively referred to as "ATO") which manufactures a cannister type vacuum cleaner and accessories, which are designed for residential home use and which are marketed through various franchise distributors who sell the same door-to-door in various areas of the United States.

Defendants, Compact Associates, Inc., Compact Bellerose, Inc., Compact Electra Corp., and Hyman Sindelman (hereinafter collectively referred to as the "Compact defendants") market ATO's vacuum cleaner and the FBP defendants' buying service, through home solicitation sales in the New York City area pursuant to territorial franchise agreements granted by both ATO and the FBP defendants.

STATEMENT OF FACTS

The following is a brief summary of the facts taken from plaintiffs' Amended Complaint (Amend. Compl., I-19) except for those statements which are erroneous conclusions of law or unwarranted insinuations, assumptions or deductions of fact. (1)

Plaintiffs' Amended Complaint alleges as follows:

(a) That in or about September of 1967, ATO and the FBP defendants entered into agreements pursuant to which the FBP defendants granted exclusive territorial licenses to ATO's distributors, including the Compact defendants, to market the buying service. The franchise agreements geographically overlap ATO's franchise arrangements with its distributors. In addition, ATO required its distributors to utilize the FBP defendants' buying service in order to promote the sale of vacuum cleaners manufactured by ATO (Amend. Compl. ¶22, I-19).

(b) That all of the defendants intended that the sale of the vacuum cleaners be tied to the sale of the buying service and that they deceived the public by fraudulently stating that the membership in the buying service was given away free of charge when, in fact, it was included in the price paid for the vacuum cleaner (Amend. Compl. ¶23, I-19).

(c) That the defendants schemed and conspired to fraudulently deceive the public (the plaintiffs) in connection

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(1) The FBP defendants do not prescribe to the facts set forth herein, however, for the limited purpose of this appeal, the facts set forth in plaintiffs' Amended Complaint shall be deemed as true.

with the sale of their respective products by instructing the Compact defendants' salesmen to engage in the following fraudulent sales practices (Amend. Compl. ¶31, I-19):

(1) To make misleading statements concerning the uniqueness, value and utility of a membership in the buying service owned and operated by the FBP defendants (Amend. Compl. ¶31(a), I-19);

(2) To fraudulently deceive the public by advising them that the membership in the FBP defendants was being given away free (Amend. Compl. ¶31(b), I-19);

(3) To fraudulently deceive the public by advising them that the membership could not be obtained for any price and could only be obtained through the purchase of the vacuum cleaner (Amend. Compl. ¶31(c), I-19); and

(4) To fraudulently deceive the public by advising them that the membership in the FBP defendants would save them many times the cost of the vacuum cleaner (Amend. Compl. ¶31(d), I-19).

(d) That plaintiffs were not advised of the actual price of a membership in the FBP defendants and had they been advised that a membership fee was only $12.00, many plaintiffs <u>may</u> have purchased the buying service without the vacuum cleaner (Amend. Compl. ¶25, I-19).

(e) That due to the fraudulent practices conducted by the defendants, plaintiffs purchased the vacuum cleaner (Amend. Compl. ¶41, I-19).

The defendants do not dispute that they utilized the one year membership in the buying service to induce the purchase of the vacuum cleaner (Aff'd. of Def. M. Robert Dortch, I-10 and Aff'd. of Def. Sindelman, I-27); however, the defendants have consistently stated that this market arrangement was no more than a conventional marketing technique pursuant to which a loss leader was utilized to induce the purchase of a primary product (Aff'd. of Def. Sindelman ¶4, I-27). Furthermore, defendants have clearly shown that the buying service offered by the FBP defendants was not unique and that there are numerous competitors who offer, to the public, memberships in buying services, almost all of which are substantially larger and possess far more resources than the FBP defendants (Aff'd. of Def. M. Robert Dortch ¶14, I-10; Aff'd. of Def. Sindelman ¶6 and Ex. C, I-27; Aff'd. of Def. Frank Dortch ¶11, I-67 and Aff'd. of Blumberg ¶12 and Ex. A, I-68).

Furthermore, defendants have consistently maintained that plaintiffs were not coerced into purchasing a second product and that at all times such plaintiffs were aware that the Compact defendants' salesmen were primarily offering a vacuum cleaner for sale and were merely giving such consumers a free gift if such purchase was consummated (Aff'd. of Def. Sindelman, I-27 and Aff'd. of Blumberg ¶18, I-56). It is equally true that the

plaintiffs have failed to prove by any credible evidence that they were coerced into purchasing an unwanted product. In fact, the affidavits submitted by plaintiffs clearly belie that they were coerced into purchasing anything.

Thelma Lindo (Aff'd. of Plf. Lindo ¶2, I-64) merely states that the contract stated "something about Family Buying Power". Accordingly, not only was she not coerced into purchasing an unwanted product but her decision to buy the vacuum cleaner was not even induced by the promotional gift.

Victoria Raphael (Aff'd. of Plf. Raphael ¶s 2 and 3, I-64) merely describes the sales presentation and the advantages of becoming a member in a buying service. Mrs. Raphael does not indicate that she was coerced into purchasing any product; nor that she felt that the tying product was unique or desirable; nor that she attempted to purchase the membership separately.

Cheryl Perry Hill (Aff'd. of Plf. Hill ¶s 4 through 6, I-64) merely indicates that Mrs. Hill was desirous of obtaining a membership in the buying service and that she would not have purchased the vacuum cleaner if a membership in the buying service was not included. Clearly, Mrs. Hill does not state that she felt coerced but rather that she was induced to purchase the vacuum cleaner by virtue of receiving a membership in the buying service. Moreover, Mrs. Hill does not state that she believed that the buying service was unique; nor that she attempted to purchase the the membership separately. Furthermore, Mrs. Hill's failure to

avail herself of the services offered by the buying services clearly negates her claim that she was induced to buy the vacuum cleaner by virtue of the free gift.

Lurline Rutherford (Aff'd. of Plf. Rutherford, I-64) makes absolutely no mention of the buying service. Accordingly, a membership in the buying service was clearly immaterial to her purchase of the vacuum cleaner.

Finally, the affidavit of Ansonia Lewis (Aff'd. of Plf. Lewis ¶s 3 through 5, I-64) describes the buying service; indicates that she would have bought the buying service separately; and indicates that she was dissatisfied with the buying service. However, Mrs. Lewis does not state she was coerced into buying an unwanted product; that she believed that the buying service was unique; that she made any attempt to purchase the buying service separately or for that matter made any attempt to see if other buying services were available.

In short, all of the affidavits clearly show that not one of the plaintiffs felt that they were coerced, nor can one even infer coercion on the basis of the statements contained therein. (2)

(2) Plaintiffs have improperly submitted (See Point V, infra) additional affidavits (Aff'd. of Plf. Hill, I-84 and Aff'd. of Plf. Rutherford, I-86), neither of which allege any facts to show that actual coercion was asserted against them.

POINT I

THE LOWER COURT CORRECTLY GRANTED SUMMARY JUDGMENT DISMISSING THE FIRST CAUSE OF ACTION CONTAINED IN PLAINTIFFS' AMENDED COMPLAINT ALLEGING AN ILLEGAL TYING ARRANGEMENT VIOLATIVE OF SECTION 1 OF THE SHERMAN ANTI-TRUST ACT (3)

The crucial issue in the instant matter is whether the lower Court misinterpreted the doctrines recently enunciated by this Court in Capital Temporaries, Inc. of Hartford v. The Olsten Corporation, 506 F.2d 658 (2d Cir. 1974).

The Court below granted summary judgment dismissing the Amended Complaint on the basis that this Court's decision in Capital Temporaries, supra, mandated that plaintiffs must prove by credible evidence that they were actually coerced into purchasing an unwanted product in order to establish a per se violation of Section 1 of the Sherman Anti-Trust Act.

The plaintiffs contend that the lower Court misinterpreted the legal standards established in Capital Temporaries, supra, and argue that it is not necessary to prove actual coercion

(3) "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: ...Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1 to 7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments in the discretion of the court."

in order to establish an illegal tie but that such coercion may be presumed by virtue of the economic power of the seller in the tying product or the uniqueness or desirability of the tying product.

Plaintiffs' Amended Complaint alleges market power over the tying product; that competitors were foreclosed from the market; and that not an insubstantial amount of interstate commerce is involved. (Amended Compl., ¶ 22 throughout I-19). Plaintiffs, however, have not alleged any factors which would indicate that the alleged market power over the tying product was ever utilized to compel the purchase of the tied product.

A. THE NEED TO SHOW ACTUAL COERCION

The FBP defendants contend that an illegal tie cannot be established absent a showing by plaintiffs of salient factors that will demonstrate that the plaintiffs were actually coerced into purchasing an unwanted product (the tied product).

The actual coercion concept was first adopted by this Court in American Manufacturers Mutual Insurance Co. v. American Broadcasting - Paramount Theatres, Inc., 446 F.2d 1131 (2d Cir. 1971), cert. denied 404 U.S. 1063 (1972). In American the claim was made that plaintiffs were coerced to advertise on certain

unwanted television stations owned by the defendants in order to advertise on certain desirable television stations. The lower Court found that plaintiff at no time seriously bargained to have the unwanted stations eliminated from the contract. Chief Judge Kaufman speaking for the Court stated as follows:

> "...But there can be no illegal tie unless unlawful coercion by the seller influences the buyer's choice." 446 F.2d 1137 (Emphasis added)

Judge Kaufman concluded:

> "...Foreclosure implies actual exertion of economic muscle, not a mere statement of bargaining terms which, if they should be enforced by market power, would then incorporate an illegal tie...." 446 F.2d 1137

Accordingly, it had long been the position of this Court that proof of actual coercion was a necessary element of an unlawful tying arrangement.

Following this Court's enunciation of the actual coercion doctrine in American, supra, the United States District Court of the Southern District of Florida in Abercrombie v. Lum's, Inc., 345 F. Supp. 387 (S.D. Fla. 1972) was confronted with a franchise anti-trust suit where there was no showing of actual coercion. Abercrombie commenced a class action against Lum's Inc. (a fast food chain) alleging that in order to obtain a Lum's franchise, the franchisee was required to: (i) purchase numerous unwanted

products from Lum's or their approved suppliers, including signs, equipment, furniture, fixtures, foods and beverages; and (ii) enter into unfavorable leasing arrangements with Lum's Inc. The Court after reviewing the facts in Lum's concluded as follows:

> "Plaintiffs also urge that the existence of an illegal tying arrangement may be shown not only by evidence of an express agreement but also through conduct extrinsic to an agreement. Advance Business Systems & Supply Co. v. SCM Corp., 415 F.2d 55 (4th Cir. 1969), cert. denied, 397 U.S. 920, 90 S. Ct. 928, 25 L.Ed.2d 101 (1970). <u>In order to establish an illegal tying arrangement arising from business conduct, franchisees must prove that they were coerced, not merely persuaded, into purchasing the products at issue here</u>. See Ford Motor Co. v. United States, 335 U.S. 303, 316-320, 69 S. Ct. 93, 93 L.Ed. 24 (1948). As the Court stated in American Mfrs. Mutual Ins. Co. v. ABC-Paramount Theatres, 446 F.2d 1131, 1137 (2d Cir. 1971), cert. denied, 404 U.S. 1063, 92 S. Ct. 737, 30 L.Ed.2d 752 (1972).
>
> '[T]here can be no illegal tie unless unlawful coercion by the seller influences the buyer's choice.'" 345 F. Supp. 397 (Emphasis added)

The well reasoned opinion in Abercrombie immediately met with judicial acceptance and the actual coercion doctrine has been consistently followed in a number of anti-trust cases. These cases include: <u>Belliston v. Texaco</u>, Inc., 445 F.2d 175, 184 (10th Cir. 1972); <u>Kentucky Fried Chicken Corp. v. Diversified Packaging Corp.</u>, 376 F. Supp. 1136, 1147 (S.D. Fla. 1974);

Smith v. Denny's Restaurants, Inc., 64 F.R.D. 459, 461 (N.D. Cal. 1974); Bogosian v. Gulf Oil Corporation, 62 F.R.D. 124, 135 (E.D. Pa. 1973); Yanai v. Fritolay, Inc., 61 F.R.D. 349, 351 (N.D. Ohio 1973); MDC Data Centers, Inc. v. International Business Machines Corp., 342 F. Supp. 502, 505 (E.D. Pa. 1972); and In re 7-Eleven Franchise Anti-Trust Litigation, 1972 Trade Cases ¶74, 156 (N.D. Cal. 1972).

It is in the light of American, supra, Abercrombie, supra, and the cases which followed that we must analyze the decision by the Court in Capital Temporaries, supra.

In Capital Temporaries, supra, plaintiff maintained that he entered into a franchise agreement with defendant pursuant to which he was permitted to utilize in his white collar temporary office personal business, defendant's registered trademark "Olsten". Plaintiff then alleged that in order to obtain defendant's "white collar" registered trademark, he was required "to establish and operate a blue collar operation under the Handy Andy Labor 'trademark'" which was likewise owned by the defendant. Plaintiff contended that this arrangement constituted an illegal tying arrangement which was a per se violation of Section 1 of the Sherman Anti-Trust Law.

The District Court of Connecticut, Hon. M. Joseph Blumenfeld, granted partial summary judgment dismissing the fifth count of Capital Temporaries' Amended Complaint alleging

an illegal tying arrangement violative of Section 1 of the Sherman Anti-Trust Act. 365 F. Supp. 888 (D. Conn. 1973).

Chief Judge Blumenfeld after analyzing the law governing the illegal use of tying arrangements under the anti-trust law, concluded that not only must the plaintiff prove the requisite economic power over the tying product but the plaintiff must clearly show that the economic power was in fact used. The Court stated as follows:

> "It must be emphasized that Fortner does not hold that the mere existence of economic power in a seller is enough to meet the first criterion needed to establish the illegality of a tie-in. The economic power must not simply exist; it must be used. '[T]here can be no illegal tie unless unlawful coercion by the seller influences the buyer's choice.' Amer. Mfrs. Mut. Ins. Co. v. Amer. B-P Theatres, 446 F.2d 1131, 1137 (2d Cir. 1971), cert denied, 404 U.S. 1063, 92 S. Ct. 737, 30 L.Ed.2d 752 (1972). See also, Belliston v. Texaco, Inc., 455 F.2d 175, 183-184 (10th Cir. 1972), cert. denied, 408 U.S. 928, 92 S. Ct. 2494, 33 L.Ed.2d 341 (1972); Abercrombie v. Lum's Inc., 345 F. Supp. 387, 391 (S.D. Fla. 1972)." 365 F. Supp. 892 (Emphasis added)

Chief Judge Blumenfeld continued:

> "...In defining the evil proscribed, all the cases talk about the power of sellers to force buyers to purchase products they might choose not to obtain from the seller if the tying arrangement did not obstruct free competition...." 365 F. Supp. 893

The plaintiff in <u>Capital Temporaries</u>, <u>supra</u>, appealed from the lower Court's decision granting partial summary judgment and requested that this Court decide the following question of law:

> "The question involved in this appeal is whether the plaintiff must establish actual coercion, outside of the agreement, to operate the tied business, in order to maintain its antitrust action or is it sufficient to show that the plaintiffs were restricted by the contract imposed by the defendant in operating any blue collar business other than the HANDY ANDY mark with the payment of franchise fees to the defendant." 566 F.2d 659-660

This Court in clear unambiguous language established that in order for an illegal tying arrangement to exist, plaintiffs had the initial burden of showing by clear and convincing proof that he was actually coerced into purchasing an unwanted product. This Court stated as follows:

> "We do not think there can be any question that no tying arrangement can possibly exist <u>unless the person aggrieved can establish that he has been required to purchase something which he does not want to take</u>....however, before the plaintiff can become entitled to the benefit of the per se doctrine, and thereby escape the proof otherwise required to establish an undue or unreasonable restraint under the rule of reason approach, it is basic that <u>he first establish that he is the unwilling purchaser of an unwanted product</u>. To that extent, <u>there must be a showing of some pressure exerted upon him</u>...." 506 F.2d 662 (Emphasis added)

This Court then went on to state that all of the leading cases involving illegal tying arrangements centered upon the threshhold question of how a plaintiff could satisfy its burden of establishing coercive pressure. This Court, after reviewing the landmark decisions involving illegal tying arrangements concluded as follows:

> "From this review of the cases we conclude that the plaintiff must establish that he was the unwilling purchaser of the tied product. If he was not coerced by the economic dominance of the seller, he at least must show that he was compelled to accept the tied product by virtue of the uniqueness or desirability of the tying product, which other competitors could not or would not supply." 506 F.2d 663 (Emphasis added)

Therefore, it is absolutely clear that plaintiffs must initially establish the existence of coercive pressure either by: (1) actual coercion due to the market dominance of the seller, or (2) that he was compelled to accept an unwanted product (the tied product) by virtue of the uniqueness or desirability of the tying product, which other competitors could not or would not supply.

The plaintiffs in the instant matter have completely misinterpreted this Court's holding in Capital Temporaries, supra, to stand for the proposition that once an inference of economic power over the tying product can be established it follows that a Court must infer that coercion exists. In other words, plain-

tiffs argue that the power to coerce exists (absent any proof) as soon as an inference of economic power over the tying product can be established. (4)

Following this Court's decision in Capital Temporaries, supra, no less than two cases have been decided by the District Court for the Southern District of New York, interpreting the standards established by this Court in Capital Temporaries, supra. In Margaret M. Landon v. Twentieth Century Fox Films, 384 F. Supp. 450 (S.D.N.Y. 1974), plaintiff contended that an illegal tying arrangement was fostered upon her and that she was compelled to sell both the copyright and copyright renewals of a literary work to Twentieth Century Fox by virtue of said firms market dominance in its field. The District Court in granting summary judgment dismissing the complaint stated as follows:

> "The second count of the complaint alleges as an unlawful tying arrangement Fox's requirement that it acquire the renewal copyright as a condition to its purchase of the original copyright. As plaintiff concedes, there is no reported case recognizing such a cause of action. Assuming, without deciding that such an arrangement may violate the anti-trust

(4) Plaintiffs' reliance on Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134 (1968) to stand for the proposition that there need be no showing of actual coercion is misplaced. Perma Life involved the question of whether or not the in pari delecto doctrine could be utilized as a defense where an illegal tying arrangement existed and not whether actual coercion had to be proven. The plaintiffs in Perma Life clearly showed that they had bargained to remove certain clauses contained in the franchise agreement and after they had executed the franchise agreement they had continued to oppose many of the illegal clauses. They further showed that defendants had repeatedly threatened to cancel various franchises if the franchisees fail to comply with the terms of the franchise agreement. Accordingly, there was a clear showing of coercive pressure brought to bear by the franchisor. No showing is present in the instant matter.

"laws, the particular claim asserted here is fatally deficient. As the Second Circuit has recently stated the exercise of actual coercion by the defendant (as distinguished from the mere presence of market power) is a necessary element of an unlawful tying arrangement. See Capital Temporaries, Inc. of Hartford v. The Olsten Corporation [1974-2 Trade Cases ¶75, 303], Docket No. 74-1077 (2d Cir. October 17, 1974) and cases cited there; of Ford Motor Co. v. United States [1948-1949 Trade Cases ¶62, 325], 335 U.S. 303, 316-320 (1948). As we read Capital Temporaries, to state a valid claim plaintiff would have to allege that (1) she wished to sell only the original copyright at the time she signed the 1944 agreement, (2) expressed that fact to Fox and, (3) that sale of the renewal copyrights was forced upon her by virtue of the superior economic strength or market dominance of Fox. However, neither the complaint nor any supporting affidavit suggest the presence of these elements...." 384 F. Supp. 457 (Emphasis added)

Similarly, in Stan Kane Home Improvement Center v. Martin Paint Stores, 1975 Trade Cases, ¶60, 379 (S.D.N.Y. 1975), the Court denied plaintiff's motion for summary judgment which alleged a purported illegal tying arrangement. The Court concluded that plaintiff had failed to establish that he was the:

"'...unwilling purchaser of an unwanted product,' i.e. that it was coerced into entering into its agreement with Martin which required it to purchase from Martin both Martin and non-Martin products, or which conditioned the purchase of some Martin products on the purchase of other unwanted Martin products". Stan Kane Home Improvement Center v. Martin Paint Stores at p. 66,646

See also E.B.E., Inc. v. Dunkin' Donuts of America, Inc., 387 F. Supp. 737 (E.D. Mich. 1971); and Ungar v. Dunkin' Donuts of America, Inc., 1975 Trade Cases, ¶60, 204 (E.D. Pa. 1975. (5)

As in Margaret Landon, supra, each of the plaintiffs in the instant matter would have to contend that: (i) they wished to purchase only the memberships in the FBP defendants; (ii) they expressed that fact to the salesman that approached them and that the salesman rejected that request; and (iii) they were coerced into purchasing the vacuum cleaner as a result of the seller's superior economic strength or market dominance with respect to the buying service.

The original affidavits (Aff'ds. of Plfs. Hill, Lindo, Raphael, Rutherford and Lewis, I-64) submitted by plaintiffs in opposition to defendant's motion for summary judgment unmasked plaintiffs' claim for what it really was, namely a consumer protection action rather than an anti-trust action. An analysis of those affidavits show beyond peradventure that not one of the plaintiffs believed that they were coerced or compelled to

(5) Ungar is a compelling opinion which is entitled to be treated with judicial respect. However, Judge Beeker's conclusion that the coercion doctrine is not a part of the law of tying arrangements is clearly at variance with the standards established by this circuit and other circuits. Therefore, the underlying premises of the Ungar decision that there can be a voluntary yet illegal tie erodes the legal significance of such opinion in the instant matter and plaintiffs' reliance upon the same is misplaced.

purchase an unwanted product. Clearly those affidavits showed the following:

(a) None of the plaintiffs claimed that they were coerced or compelled to purchase either the vacuum cleaner or the buying service;

(b) Three of the plaintiffs (Thelma Lindo, Victoria Raphael and Lurline Rutherford) make only a passing reference or no reference at all to the membership they obtained in the FBP defendants and, therefore, clearly this indicates that the membership was merely an adjunct to their purchase of the vacuum cleaner;

(c) Only one of the five named plaintiffs (Ansonia Lewis) even attempted to utilize the services offered by the FBP defendants;

(d) While some of the plaintiffs indicated they would not have purchased the vacuum cleaner (Ansonia Lewis and Cheryl Perry Hill) if they did not receive the membership in the FBP defendants, none of the plaintiffs indicate they believed the membership was unique and that it could not be obtained from other sources;

(e) Not one of the plaintiffs made the slightest attempt to see if other buying services were available;

(f) All of the plaintiffs understood that the principal purpose for the salesman's presence in their home was to sell the vacuum cleaner and that the membership in the FBP defendants was a mere adjunct to that purchase;

(g) None of the plaintiffs allege that they were deceived into believing that the buying service offered by the FBP defendants was the only buying service available to them; and

(h) That not one of the plaintiffs attempted to purchase the membership without buying the vacuum cleaner.

After the lower Court granted defendants motion to reargue and then reversed its decision and granted defendants summary judgment, plaintiffs then moved for reargument. As part of plaintiffs' motion papers, new affidavits were submitted (Aff'ds. of Plf. Hill, I-84 and Aff'd. of Plf. Rutherford, I-86).[6] Both plaintiffs for the first time, without offering one shred of evidence to support their preposterous statements, blightly utilized the word "coercion".

Neither plaintiff stated unequivocably that they were coerced, but rather Cheryl Perry Hill, for the first time stated that "I can see now that FBP was being used only to get me to

(6) The introduction of these new affidavits were clearly improper (see Point V <u>infra</u>) and are not properly part of the Record on Appeal in this Court. However, the affidavits again point out that plaintiffs are unable to establish coercive pressure.

sign a contract for the Compact company. By making it impossible for me to obtain FBP separately, the Compact company really coerced me into buying the Compact vacuum cleaner..." (Aff'd. of Plf. Hill ¶4, I-84) and Lurline Rutherford stated "...I believe that Family Buying Power was used to coerce me..." (Aff'd. of Plf. Rutherford ¶5, I-86).

Clearly, the meaning of Mrs. Hill's affidavit was that she believed all along that she was induced to purchase the vacuum cleaner rather than coerced. Now, after consulting with her attorneys and being apprised of the lower Court's decision, she suddenly saw the light and for the first time changed the word "induced" to "coercion". The sheer nonsense of Mrs. Hill's use of the word "coerced" is shown by her use of the words "I can see now", and by virtue of the fact that she had never heard of a buying service prior to the demonstration of the vacuum cleaner and, therefore, had no real need for the same. Moreover, Mrs. Hill never even attempted to utilize the buying service which belies any statement on her part that she was coerced into purchasing something she did not want in order to obtain the buying service.

Similarly, Mrs. Rutherford did not state that she was coerced, but rather that she <u>believed</u> (parenthetically this was the first time that the statement was made) that she was coerced.

As in the case of Mrs. Hill, Mrs. Rutherford had never heard of a buying service and only attempted to use FBP's buying service on one occasion. These factors clearly show that Mrs. Rutherford never had a need for a buying service and clearly negated the statements by Mrs. Rutherford that she was coerced into purchasing an unwanted product.

It is absolutely clear from the affidavits submitted by plaintiffs in the case at bar that none of them felt that they were being coerced into purchasing anything. All that can be gleaned from plaintiffs' affidavits were that cetain of the plaintiffs believed that it would be advantageous to them to own a membership in the FBP defendants and this alone is not enough to sustain plaintiffs' claim that an illegal tying arrangement existed. Further, not one of the plaintiffs indicated that they attempted to buy the membership separately nor that the vacuum cleaner was forced upon them by virtue of their belief that this was the only buying service available to them. Therefore, it is quite apparent that none of the plaintiffs were coerced into buying anything but rather that some of the plaintiffs were induced to purchase the vacuum cleaner because of the added incentive of receiving the buying service.

No matter how diligently plaintiffs' counsel labors to disingeniously create an anti-trust violation, their efforts

must fail for the simple reason that each of the plaintiffs are unable to change the facts as they existed at the time that each of the plaintiffs purchased the vacuum cleaner and received a one year membership in the buying service. The simple truth is that each plaintiff knew at the time they purchased the vacuum cleaner that the membership in the buying service offered by the FBP defendants was a mere adjunct to the sale of the vacuum cleaner. Accordingly, it is beyond doubt or cavil that all of the credible evidence in the case at bar reflects that each of the plaintiffs purchased the vacuum cleaner voluntarily and even if economic power existed with respect to the tying product (which is clearly not the case) plaintiffs' first cause of action must be dismissed due to plaintiffs' inability to prove actual coercion.

Even assuming that there is no need to prove actual coercion as a necessary element in an illegal tying arrangement, plaintiffs have failed to allege any facts which would give rise to an inference that they were coerced into purchasing an unwanted product. There is no credible evidence to indicate that such coercion resulted from the economic dominance of the seller nor from the uniqueness or desirability of the tying produce which other competitors could not or would not supply.

B. <u>THERE ARE NO FACTS TO INDICATE ECONOMIC DOMINANCE OVER THE TYING PRODUCT.</u>

It is axiomatic for an alleged tie to exist which is a per se violation of the Sherman Anti-Trust Act; plaintiffs are required to establish not only the existence of the tie but also that the tying product possesses sufficient economic power to appreciably restrain free competition in the tied product. <u>Northern Pacific Railway Co. v. United States</u>, 356 U.S. 1 (1958).

It is not disputed that the United States Supreme Court has reduced the standards of sufficient economic power requiring far less than a monopoly. Indeed, the Supreme Court in <u>Fortner Enterprises, Inc. v. United States Steel Corp.</u>, 304 U.S. 495 (1969) stated as follows:

> "The standard of 'sufficient' economic power' does not, as the District Court held, require that the defendant have a monopoly or even a dominant position throughout the market for the tying product. Our tie-in cases have made unmistakably clear that the economic power over the tying product can be sufficient even though the power falls far short of dominance and even though the power exists only with respect to some of the buyers in the market." 495 U.S. 502-503

It is equally true that where credible evidence clearly shows a lack of dominance over the tying product, then there can be no illegal tying arrangement. Mr. Justice Black in <u>Northern</u>, <u>supra</u>, stated the principal as follows:

"...Of course where the seller has no control or dominance over the tying product so that it does not represent an effectual weapon to pressure buyers into taking the tied item any restraint of trade attributable to such tying arrangements would obviously be insignificant at most. As a simple example, if one of a dozen food stores in a community were to refuse to sell flour unless the buyer also took sugar it would hardly tend to restrain competition in sugar if its competitors were ready and able to sell flour by itself." 356 U.S. 7

Defendants have repeatedly maintained[7] that there are numerous other buying services, discount stores and mail order houses, most of which are larger and have far greater resources than the FBP defendants. In addition, there are many manufacturers that manufacture, sell and distribute vacuum cleaners, most of which are larger and have greater resources than the combined operations of ATO and the Compact defendants.[8] It cannot be disputed that purchasers are free to purchase memberships in other buying services while at the same time buying a vacuum cleaner from literally hundreds of retail sources at probably lower costs than defendants offer their products and services. Accordingly, plaintiffs' suggestion that defendants possessed economic power over the tying product which literally approached a monopoly is absurd on its face.

(7) See Aff'd. of Def. Dortch, ¶14, I-10; Aff'd. of Def. Sindelman, ¶6 and Ex. C, I-27; Aff'd. of Blumberg, ¶10b, I-56*; Aff'd. of Blumberg, ¶12 and Ex. A I-68 and Def. M. Robert Dortch and Frank Dortch Ans. to Plf. Interrogatories No. 80, I-75.

(8) See Aff'd. of Limacher, ¶4, I-22.

* Aff'd. of Def. Frank Dortch ¶11, I-67.

The only evidence to support plaintiffs' bold conclusory allegations of economic power is a study of buying services listed as competitors of the FBP defendants by defendant Sindelman (Aff'd. of Def. Sindelman, ¶6 and Ex. C, I-27). Despite the fact that plaintiffs' survey is incomplete, the results of such survey prove nothing and, in fact, plaintiffs have ignored all of the other credible evidence offered by the defendants.

Furthermore, plaintiffs do not even urge in their pleadings that defendants exercise a dominant position in the tying product, rather they rely upon market dominance over the tying product by virtue of the alleged uniqueness of the same (Amended Compl. ¶25, I-19). Similarly, plaintiffs' request for leave to serve a seconded Amended Complaint contains no allegations that defendants exercise a dominant market position with respect to the tying product (Aff'd. of A. Bentley, ¶19, I-84).

As aforesaid, all of the credible evidence offered in the instant matter clearly shows that the defendants lacked market dominance over the tying product.

Plaintiffs, confronted with their inability to establish any factors showing actual coercion or market dominance over the alleged tying product, urge upon this Court the spurious contention that defendants were compelled to purchase the tying product as a result of the uniqueness or desirability of the tying product.

C. THERE IS NO BASIS TO PRESUME COERCION TO PURCHASE THE ALLEGED TIED PRODUCT BY VIRTUE OF THE UNIQUENESS OR DESIRABILITY OF THE ALLEGED TYING PRODUCT.

Plaintiffs' misplaced reliance on Fortner, supra, to stand for the sweeping proposition that market power over the tying product may be inferred simply by general allegations of (i) uniqueness or desirability of the tying product; or (ii) the manner in which the tying product is marketed; or (iii) the state of mind of the consumer; or (iv) alleged price differentials is completely untenable.

In Fortner, plaintiff alleged that in order to obtain financing to purchase and develop a tract of land, it was required to purchase prefabricated houses manufactured by defendants. The affidavits submitted by plaintiff in Fortner clearly established that the prefabricated houses sold to plaintiff were in excess of the going market rate for comparable prefabricated houses manufactured by others and that the prefabricated houses were accepted by plaintiff solely because of defendants willingness to provide financing equal to the purchase price of the land, which financing was unavailable from any other source on comparable terms. On the basis of the proof submitted, the Supreme Court reversed a lower Court decision granting summary judgment to the defendants since plaintiff had at least established to the Supreme Court's satisfaction that the credit terms (the tying

product) were sufficiently unique (requiring the developer to put up no money of his own) to permit a jury to determine whether defendants had market power over the tying product to compel the purchase of the prefabricated houses (the tied product).

The Supreme Court took great pains, however, to point out that the Court did not accept Fortner's contention that market power could be presumed simply by virtue of the credit terms. Mr. Justice Black, speaking for the Court, stated:

> "Uniqueness confers economic power only when competitors are in the same way prevented from offering the distinctive product themselves. Such barriers may be legal, as in the case of patented and copyright products, e.g. International Salt; Lowe's, or physical as when the product is land, e.g. Northern Pacific. It is true that the barriers may also be economic, as when competitors are simply unable to produce the distinctive product profitably, but the uniqueness tests in such situation is somewhat confusing since the real source of economic power is not the product itself but rather the Seller's cost advantage in producing it." 394 U.S. at 505 n. 2 (Emphasis added)

Therefore, Fortner is not apposite to plaintiffs' contention that economic or market power can be presumed absent a showing of facts of uniqueness and the inability of competitors to offer the tying product.

To reiterate, this Court in Capital Temporaries, supra, has interpreted Fortner, supra, to mandate that a plaintiff must initially prove that he was coerced into purchasing an unwanted product due to the uniqueness or desirability of the wanted product and that other competitors could not or would not supply the wanted product.

In the first instance, there is not one shred of evidence offered by plaintiff to establish that the buying service offered by the FBP defendants is in any way unique or more desirable than any other buying service offered by any of the competitors of the FBP defendants. Plaintiffs' failure to allege any factors showing the uniqueness or desirability of the buying service offered by the FBP defendants is fatal to their claim that the defendants imposed an illegal tying arrangement. See Cities Service Oil Company v. Coleman Oil Co., 470 F.2d 925 (1st Cir. 1972), cert. denied, 411 U.S. 967 (1973); Washington Gas Light Company v. Virginia Electric and Power Company, 438 F.2d 248 (4th Cir. 1971); Spens v. Citizens Federal Savings & Loan Ass'n., 464 F. Supp. 1161 (N.D. Ill. 1973).

Moreover, the test is not just uniqueness but that such uniqueness be protected by some economic barrier preventing others from producing the same. What economic barriers exist which prevent any other manufacturer of vacuum cleaners sold in the

sa[illegible] manner as ATO's vacuum cleaner from promoting their sale by offering a free membership in another buying service to induce the purchase of its vacuum cleaner? We respectfully submit that plaintiffs have offered no evidence as to the barriers which would prevent competitors from offering a similar promotional package.

In all of the prior cases concerning an illegal tying arrangement, the Courts have at least found some barrier which prevented a competitor from entering the field with respect to the tying product. For example: International Salt Co., Inc. v. United States, 332 U.S. 392 (1947) the barrier was patents on the machinery which the Court held as the tying product; Northern Pacific Railroad Company v. United States, supra, the barrier was land which was strategically situated; United States v. Lowe's Inc., 371 U.S. 38 (1962) the barrier was a copyright on the artistic material and that artistic material was clearly unique which the Court held as the tying product; and Fortner Enterprises, Inc. v. United States Steel Company, supra, the barrier (which the Court specifically reserved decision upon) was favorable credit terms which other competitors would not or could not offer.

In the case at bar, the membership in the buying service is not patented, nor copyrighted,(9) and under no congery of facts

(9) Plaintiffs have stated that some of the procedures utilized by the FBP defendants have been copyrighted and that this creates a barrier to their competitors. However, the FBP defendants (Aff'd. of Def. Frank Dortch, ¶s 4-8, I-67) have clearly shown that the copyrights owned by the FBP defendants are ancillary to its operations and afford no protection to preventing any of its competitors from reproducing the copyrighted material.

can plaintiff maintain that the service offered by the FBP defendants are so unique that no other competitor would not or could not offer the same. Therefore, it is clear that not only can others offer the same services as the FBP defendants as in the case at bar, but in fact, others do offer similar services.

Therefore, even assuming that the buying service offered by the FBP defendants is unique or desirable (all the credible evidence seems to indicate the contrary) it is abundantly clear that plaintiffs have offered no credible evidence to establish any normal barrier which would prevent competitors from offering a similar buying service. Finally, plaintiffs confronted with their inability to establish any factors which would indicate that the buying service itself is unique or desirable, have set up a barrage of spurious criteria to prove uniqueness, such as (i) the giving away of the buying service for free; (ii) the state of mind of the consumer, and (iii) the price differential of the tied product when compared with similar products.

The mere fact that a product or service is given away free denotes nothing more than the type of marketing arrangement that the parties envisioned, namely, that the parties were inducing the purchase of a second product by engaging in a standard commercial promotional arrangement whereby a loss leader is used to gain access to the market. We have uncovered no judicial decisions which would stand for the sweeping proposition that

conventional marketing arrangements will be frowned upon by the Courts. In fact, Mr. Justice White clearly pointed out in his dissenting opinion that Fortner, supra, should not be misinterpreted to prohibit promotional marketing arrangements similar to the one in the case at bar, when he stated as follows:

> "...The basis for the rule is clear where the seller is dominant in the tying product market, where the product is patented, or where it is in short supply. In these cases the restraint on competitors in the tied product as well as on buyers of the tying product is reasonably apparent. But I question that buyers' acceptance of the tie-in - the simple fact that there are customers - will always suffice to prove market power in the tying product. Where the seller exercises no market power in the tying item but buyers prefer the tie-in because the seller offers the tying product on favorable terms - where the price is unusually low or where the seller gives the product away conditioned on buying other merchandise - the seller in effect is merely competing in the tied product market. Buyers are not burdened. They may buy both tied and tying products elsewhere on normal terms. Nor are the seller's competitors restrained. The economic advantage of the tie-in to buyers can be matched by other sellers of the tied product by offering lower prices on that product. Promotional tie-ins effected by underpricing the tying product do not themselves prove there is any market power to exercise in that product market, unless the economic resources to withstand lower profit margins and the willingness to compete in this manner are themselves suspect. If they are, however, they should as surely taint and muffle hard price competition in the tied market itself, a result which, short of a §2 violation, it would be difficult to reach under the Sherman Act." 394 U.S. at 518 (Emphasis added)

For this Court to hold absent any other factors that the giving away of one product or service to induce the purchase of a second product creates an inference of uniqueness, would be to condemn every promotional marketing arrangement and would literally create a Pandora's Box which would open the Courts to a floodgate of litigation. Moreover, at least, in Fortner, supra, the plaintiff was able to prove that the credit offered by United States Steel was not available from any other source. Here all that plaintiffs offer is a bold conclusion that the giving away of a product for free creates an inference of uniqueness without offering any evidence to show that no other competitors are engaged in similar marketing arrangements. Therefore, plaintiffs' contention that the promotional marketing arrangements create an inference of uniqueness is completely without merit.

Similarly, plaintiffs' second contention that the state of mind of the buyer [10] in believing that product is unique should be deemed sufficient to infer market or economic power over the tying product is a mere esoteric flight into fantasy which is not supported by law. In the first place, as aforesaid, the furthest that any Court has gone to infer economic

(10) Plaintiffs contend that defendants engaged in fraudulent sales practices which engendered in the mind of the consumer that the buying service was in fact unique. Plaintiffs' scenario goes on to state that other competitors are barred since they cannot engage in similar practice. Therefore, plaintiffs opine that a Court could infer uniqueness (Appellants' Brief, P. 41).

power with respect to the tying product has occurred only in those cases where the tying produce was either copyrighted or patented. See International Salt Co., Inc. v. United States, supra, and United States v. Lowe's, Inc., supra. Obviously, no material copyright or patent exists in the case at bar.

Cases involving anti-trust laws have made it abundantly clear that the mere use of fraudulent sales techniques is not sufficient to create a violation of the anti-trust laws (See Point II, infra). Therein lies the fallacy of plaintiffs' hypothesis. Plaintiffs are in fact asking this Court to broaden the standards for determining uniqueness of the tying product so as to accept a subjective standard predicated upon the belief of the buyer rather than the objective standards uniformly followed by the Courts. For this Court to accept a subjective standard (whether fraud is present or not) would exacerbate the very essence of the anti-trust laws and open the Courts to an insurmountable amount of litigation. Instead of fostering competition, it would have a deliterous effect on the same, since sellers would have to fear establishing unique marketing concepts due to the possibility that a disgruntled buyer would be free to bring an anti-trust action solely predicated upon his state of mind that a product was unique, regardless of the actual facts.

Plaintiffs' last contention that uniqueness of the tying product may be inferred simply by virtue of the fact that the tied product is allegedly marketed at artifically inflated prices has no substance in law or fact.

In the first instance the statement that the vacuum cleaner has been marketed at an artificially inflated price is predicated on the manufacturing costs of the vacuum cleaner without regard to the extremely high overhead required in marketing products door-to-door. Plaintiffs have failed to supply to this Court the prices that other manufacturers offer comparable vacuum cleaners marketed door-to-door, which is the true test as to whether or not the tied product is marketed at an inflated price. In fact, ATO (Aff'd. of Limacher, ¶4, I-22) clearly shows that the retail price of the Compact vacuum cleaner was competitive with the retail price of other retail vacuum cleaners sold door-to-door.

Assuming arguendo that ATO's vacuum cleaner was marketed at a disproportionate price, this would not relieve plaintiffs of their burden of proving that the tying product was unique or desirable and that other competitors would not or could not offer the tying product. As aforesaid, plaintiffs have not even attempted to meet this burden of proof.

It is apparent from a review of the facts and law in the instant matter that a long conceptual leap would be needed for this Court to hold that the arrangement among the defendants, in the case at bar, constituted an illegal tying arrangement.

However, this Court need not consider whether such a step would be necessary or consistent with existing tie-in case law, since there is no showing of coercion, market dominance over the tying product or the purchase of an unwanted product caused by the uniqueness or desirability of the tying product and that competitors would not or could not offer the tying product.

D. THE MERE EXISTENCE OF MARKETING TWO PRODUCTS TOGETHER DOES NOT GIVE RISE TO AN INFERENCE THAT DEFENDANTS HAVE ENGAGED IN AN ILLEGAL TYING ARRANGEMENT.

Finally, we must turn to plaintiffs' last contention that the acceptance of the promotional package (the buying service and the vacuum cleaner) by an appreciable number of buyers creates an inference of coercion (Appellants' Brief, Pgs. 29-31).

The fact that a consumer when purchasing one product is given other product for nothing does not create an inference either of coercion or market dominance. As the Supreme Court in Fortner, supra, pointed out the mere acceptance by an "appreciable number of buyers" of two products may not always show the seller's economic power since the arrangement may serve a "legitimate business purpose". 394 U.S. at 506. For example, tying arrangements may be legitimate to protect goodwill or to protect a new business. Dehydrating Process Co. v. A. D. Smith Corp., 292 F.2d 653 (1st Cir. 1961), cert. denied, 368 U.S. 931 (1961); Standard Oil Co. of California & Standard Stations v. United States, 337

U.S. 293 (1949); United States v. Jerrold Electronics Corp., 187 F. Supp. 545 (E.D. Pa. 1960) aff'd. per Curriam, 365 U.S. 567 (1961); and White Motor Co. v. United States, 372 U.S. 253 (1963). Similarly, Mr. Justice White's dissent in Fortner, supra, explicitly points out that promotional arrangements should not constitute a violation of the anti-trust laws, 394 U.S. at 518. Likewise, the coercion standards adopted by this Court in Capital Temporaries, supra, would not include mere acceptance of a promotional package absent any other factors.

In short, the mere offering of a promotional package to induce the purchase of a product, absent any other factors, has never been held in and of itself to constitute an illegal tying arrangement violative of the anti-trust laws. The fact that plaintiff has not been able to offer any evidence of economic power over the tying product nor evidence of actual coercion to compel the purchase of the tied product is not overcome by offering evidence that an appreciable number of consumers have received both products. Therefore, the lower Court properly dismissed the first cause of action contained in plaintiffs' Amended Complaint.

POINT II

THE LOWER COURT CORRECTLY GRANTED SUMMARY JUDGMENT DISMISSING THE SECOND CAUSE OF ACTION CONTAINED IN PLAINTIFFS' AMENDED COMPLAINT ALLEGING A PER SE VIOLATION OF SECTION 1 OF THE SHERMAN ANTI-TRUST ACT DUE TO FRAUDULENT SALES PRACTICES.

The Court below in its Memorandum and Order dated March 5, 1975 (Mem. and Order, I-83) granted summary judgment dismissing the second cause of action of plaintiffs' Amended Complaint stating that the Anti-Trust Act was never intended to cover common law fraud and deceit.

Plaintiffs have opined that alleged fraudulent sales practices in and of themselves may give rise to a per se violation of Section 1 of the Sherman Anti-Trust Act. It is clear that the practices alleged amount to no more than common law fraud, which plaintiffs hope, by virtue of their disingenous pleadings, to clothe into a violation of the Federal Anti-Trust laws in order to obtain jurisdiction in the Federal Courts.

At the outset what must be borne in mind is that the anti-trust statutes upon which plaintiffs rely do not purport to be a code of ethical behavior for the conduct of business. The anti-trust acts are concerned with one aspect of business life and one only: the preservation of competition.

In <u>Apex Hosiery Co. v. Leader</u>, 310 U.S. 469 (1940) involving the wanton destruction of property, the Court held:

> "These cases show that activities of labor organizations not immunized by the Clayton Act are not necessarily violations of the Sherman Act. Underlying and implicit in all of them is recognition that the Sherman Act was not

"enacted to police interstate transportation, or to afford a remedy for wrongs, which are actionable under state law, and result from combinations and conspiracies which fall short, both in their purpose and effect, of any form of market control of a commodity, such as to 'monopolize the supply, control its prices, or discriminate between its would-be purchasers...."

The Court further said:

> "If, without such effects on the market, we were to hold that a local factory strike, stopping production and shipment of its product interstate, violates the Sherman Law, practically every strike in modern industry would be brought within the jurisdiction of the federal courts, under the Sherman Act, to remedy local law violations. The Act was plainly not intended to reach such a result, its language does not require it, and the course of our decisions precludes it. The maintenance in our federal system of a proper distribution between state and national governments of policy authority and of remedies private and public for public wrongs is of a far-reaching importance. An intention to disturb the balance is not lightly to be imputed to Congress...." 310 U.S. 513

Similarly, in <u>Hunt v. Crumboch</u>, 325 U.S. 821 (1945) involving a refusal by a union to deal with a certain trucker, the Court stated:

> "...That Act does not purport to afford remedies for all torts committed by or against persons engaged in interstate commerce...." 325 U.S. 826

Likewise, in Parmelee Transportation Company v. Keeshin, 292 F.2d 794 (7th Cir. 1961), cert. den., 368 U.S. 944 (1962) where the Court assumed collusion in awarding a competitive bid, the Court stated:

> "...However, the use of conventional anti-trust language in drafting a complaint will not exte[illegible] the reach of the Sherman Act to wrongs be actionable under the state law. We are not concerned with labels. Otherwise, an adroit anti-trust lawyer might use his skill in the use of the words to convert many unlawful acts into antitrust violations. The anti-trust laws were never meant to be a panacea for all wrongs." 292 F.2d 804

In Norville v. Globe Oil & Refining Co., 303 F.2d 281 (7th Cir. 1962) the Court found that the claims asserted by plaintiff amounted "to overreaching, imposition and fraud in a business transaction" nevertheless it granted summary judgment to the defendant on the basis that these claims do not involve anti-trust violations.

See also, Ace Beer Distributors, Inc. v. Kohn, Inc., 318 F.2d 283 (6th Cir. 1963) cert. den., 378 U.S. 922 (1964) where the Court refused to find a violation of the anti-trust acts when a manufacturer refuses to deal with a distributor.

Therefore, accepting plaintiffs' characterizations of the conduct and motives of defendants and assuming such

conduct and motives to be morally wrong or legally wrong by some law other than the anti-trust laws, still so far as Section 1 of the Sherman Anti-Trust Act is concerned, the defendants have done no more than to exercise their lawful rights with respect to their own service and they have done nothing prohibited by this Section. Accordingly, the acts of fraudulently selling a product are not violative of the anti-trust law, unless the sale is accompanied with the intent to monopolize or unduly restrain interstate trade or commerce and generally pleading anti-trust allegations are insufficient absent facts which prove such allegations to be sustainable. See 15 Anti-Trust Bulletin, 361 at 365 (1970) and 68 Yale Law Journal, 949 at 950.

Moreover, there is not one factual allegation delineating that any of the defendants' competitors have suffered losses of sales or have been forced to cease operations or have been foreclosed from the market or for that matter, how plaintiffs have been precluded from exercising their free choice of purchasing other similar products.

The Supreme Court in Northern Pacific Railway Company v. United States of America, supra, stated that the anti-trust laws were enacted for the sole and exclusive purpose of preserving

competition, Mr. Justice Black, speaking for the Court, stated as follows:

> "The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions. But even were that premise open to question, the policy unequivocally laid down by the Act is competition. And to this end it prohibits 'Every contract, combination...or conspiracy, in restraint of trade or commence among the several States.' Although this prohibition is literally all-encompassing, the courts have construed it as precluding only those contracts or combinations which 'unreasonably' restrain competition." Standard Oil Co. of New Jersey v. United States, 221 U.S. 1, 31 S. Ct. 502, 55 L.Ed. 619; Chicago Board of Trade v. United States, 246 U.S. 231, 38 S. Ct. 242, 62 L.Ed. 683. 356 U.S. at 517 and 518

Therefore, it behooves plaintiffs, other than by broad mosaics, to allege specific facts and acts to show that competition has in fact been affected by the acts of defendants. All that can be discerned from the amended complaint is that the plaintiffs alleged that they were misled into purchasing a vacuum cleaner and this is in and of itself insufficient to state a cause of action under the Anti-Trust Laws.

In Shotkin v. General Electric Co., et al., 171 F.2d 236 (10th Cir. 1948), the Court in dismissing a Complaint similar to the one in the case at bar, stated as follows:

> "...In other words, the complaint failed to allege facts from which it could be determined as a matter of law that a combination or conspiracy was entered into which brought about an increase in prices to the consuming public, a diminution in the volume of merchandise in the competitive markets, a deterioration in the quality of the merchandise available in the channels of commerce, or any other like evil consequence in the free flow of interstate commerce. Instead, the pleading bore clear internal indications of a personal grievance on the part of plaintiff based solely and exclusively upon the declination of the defendant... to transact business with him as an outlet for its manufactured merchandise, with no evil consequence to the consuming public." 171 F.2d 239

See also, Kinnear-Weed Corp. v. Humble Oil & Refining Co., 214 F.2d 891 (5th Cir. 1954); Conference of Studio Unions, et al. v. Loew's, Inc., et al., 193 F.2d 51 (9th Cir. 1951), cert. den., 342 U.S. 919 (1952); Fedderson Motors v. Ward; 180 F.2d 519 (10th Cir. 1950).

Therefore, plaintiffs' second cause of action is at best a consumer protection action predicated upon fraudulent sales practices which has never been a violation of the Federal Anti-Trust Laws. Accordingly, the lower Court correctly dismissed the

second cause of action as a matter of law. Seligson v. Plum Tree, Inc., 350 F. Supp. 441 (E.D. Pa. 1972); Encore Stores, Inc. v. May Department Stores Co., 164 F. Supp. 82 (S.D. Cal. 1958).

POINT III

THE LOWER COURT ERRED WHEN IT CERTIFIED A CLASS

The Court below in its Memorandum and Order dated January 21, 1975 (Memo. and Order, I-72) certified a subclass consisting of all persons who have purchased or received a "buying service" operated by the FBP defendants together with a vacuum cleaner manufactured by ATO from the Compact defendants during the period March 20, 1969 to December 3, 1973.

Thereafter, each of the defendants moved to have the lower Court reconsider its decision with respect to its class action certification (I-73 through I-78). The Court below by virtue of its decision to grant summary judgment dismissing the Amended Complaint (Memo. and Order, I-83) apparently felt it unnecessary to reconsider this aspect of the litigation. The FBP defendants are cognizant that the lower Court's decision relative to the certification of the class is not before this Court, however, in the interest of judicial prudence and to expedite this litigation, it is felt that this matter should be brought to this Court's attention.

A review of the Record on Appeal clearly indicates that the sole basis of alleged economic power over the tying product arises simply by virtue of alleged fraudulent sales practices implemented by the Compact defendants. These fraudulent sales practices supposedly engendered in the minds of the plaintiffs that the buying service was unique. It is clear that none of the plaintiffs claimed to have heard of the FBP defendants' buying service nor of any other buying service prior to the sales presentation. Moreover, none of the defendants have claimed that they even considered obtaining a buying service prior to the sales presentation.

Accordingly, we are dealing with numerous sales representations made to many consumers wherein the presentation will vary with respect to each salesman and the impact of the presentation will vary from customer to customer.

It is well settled that class action certification is not appropriate where alleged oral misrepresentations form the basis of the claim. See Ingenito v. Bermac Corporation, 376 F. Supp. 1154, 1166 (S.D.N.Y. 1974). Similarly, in Goldstein v. Regal Crest, CCH Fed. Sec. L. Rep. §93, 985 (E.D. Pa. 1973) the Court denied class action and stated:

> "Oral misstatements, however, do not permit the same inference of common conduct. Such statements clearly cannot

be standardized, particularly when they are made by several different persons. It is also clear that, having been made solely to individuals, they are not likely to have the same causal relationship to future misstatements in order to demonstrate a course of common conduct. Since no statements were ever made to the public, but only to individuals, any course of conduct which was common to all members of the class would have to be developed by individual proofs. It cannot be said that common questions predominate over these individual questions which go to the very heart of the charges..." (at P. 93962)

See also, Morris v. Burchard, 51 F.R.D. 530, 534 (S.D.N.Y. 1971); Moscarelli v. Stamm, 288 FS 453, 462 (E.D.N.Y. 1968).

Similarly, there appears to be unanimity in the Federal Courts that when the existence of coercion must be determined on an individual basis (as in the case at bar) the "commonness" required by Rule 23(a)(2) of the Federal Rules of Civil Procedure is absent. See Abercrombie v. Lum's, Inc., supra; Lan v. Shell Oil Co., 50 F.R.D. 198 (S.D. Ohio 1970); and Hettinger v. Glass Specialty Co., Inc., 59 F.R.D. 286 (N.D. Ill. 1973). This proposition was well stated by the Court in Abercrombie as follows:

"[t]he individuality of the proof would cause this suit to degenerate at trial into multiple lawsuits separately tried, exploring the relationships between each of [the purported class members] and the defendants on numerous alleged ties."

Therefore, it is clear that this action does not lend itself to class action certification since the alleged use of oral misrepresentation to sustain the concept of market power over the tying product and to determine whether coercion was present will necessarily vary from sale to sale.

POINT IV

THE COURT BELOW PROPERLY GRANTED SUMMARY JUDGMENT DISMISSING THE COMPLAINT SINCE PLAINTIFFS' ALLOCATIONS OF ANTI-TRUST VIOLATIONS WERE CLEARLY OF A DUBIOUS AND SPURIOUS NATURE

Plaintiffs' reliance on Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464 (1962) and other cases to stand for the proposition that summary procedure should not be applied in complex anti-trust litigation, is misplaced in the case at bar. For example, in Poller, supra, the Supreme Court was confronted with a complex anti-trust action which alleged a conspiracy of enormous proportion and where the motive and intent of the parties played an important role in deciding whether or not anti-trust violations had occurred.

In the instant matter, plaintiffs' first cause of action alleges an illegal tying arrangement predicated upon a standard marketing technique of promoting the sale of one product by offering another at either a reduced cost or free of charge. The defendants have clearly indicated that their motive and intent in connection with this promotional arrangement was to

induce the purchases of ATO's vacuum cleaner. Accordingly, motive and intent play no role in the case at bar, nor is there basis to allege that the facts in the instant matter could remotely be deemed complex. Either this Court must hold that promotional marketing arrangements of this sort are in and of themselves violative of the Sherman Anti-Trust Act or it must dismiss plaintiffs' first cause of action as a matter of law.

Plaintiffs' second cause of action is simply predicated upon common law fraud, which utilizes broad mosaics to plead that interstate trade or commerce was unduly restrained as a result of such fraudulent practices.

The FBP defendants have always, as they must, assumed that plaintiffs' allegations of fraudulent sales practices shall be deemed to be true. Accordingly, the Court is again confronted with a simple threshhold question as to whether or not fraudulent sales practices are in and of themselves violative of the Anti-Trust Laws.

In two recent cases the United States Court of Appeals For the Second Circuit has rejected the application of Poller and granted defendants summary judgment where it was clear that the allegations of Anti-Trust violation were at best spurious and the facts in and of themselves were not complex. See Capital Temporaries, Inc. v. The Olsten Corporation, supra, and

Coniglio v. Highwood Services, Inc., 495 F.2d 1286 (2d Cir. 1974). It is respectfully submitted that the lower Court correctly granted summary judgment dismissing the Amended Complaint and properly put an end to this spurious and dubious anti-trust litigation.

POINT V

THE COURT BELOW DID NOT ERR IN DENYING PLAINTIFFS' LEAVE TO AMEND THEIR COMPLAINT AND 9(g) STATEMENT AND TO SUBMIT ADDITIONAL EVIDENCE.

A. THE LOWER COURT CORRECTLY DENIED PLAINTIFFS' REQUEST TO AMEND THEIR COMPLAINT.

It is beyond dispute that a trial court has discretion to grant or deny a motion to amend. See generally, 35A C.J.S. §327; 3 Moore's Federal Practice (2d Ed. 1948)¶ 15.08 through 1510. The one principle that is clear from a review of the many cases cited in these authorities is that each case must be decided on its own facts. This principle is well stated in C.J.S. as follows:

> "Where a party requires leave of Court to amend a pleading, the allowance of amendments is within the sound discretion of the Court, under the facts and circumstances of each case..." 35A C.J.S. §327 at 496 (Emphasis added)

It is abundantly clear that when comparing plaintiffs' Amended Complaint (Amend. Com., I-19) with plaintiffs' proposed

amendment (Aff'd. of A. Bentley ¶19, I-84) that the proposed amendment would do nothing more than simply add the word "coercion". This bold conclusory addition is not coupled with any salient facts which would indicate the bases of such coercion. Accordingly, the proposed amendment could not possibly cure the defect under which the lower Court granted summary judgment.

Therefore, the Court properly denied plaintiffs' request to amend since such amendment would be unnecessary and futile. Accordingly, as stated in C.J.S.:

> "On the other hand, various amendments have been held improper or such that they could be refused by the Court within its exercise of discretion. Thus, in general, leave to amend a complaint will not be granted where the amendment is unnecessary or would be futile...." 35A C.J.S. §339 at 513

See also, Monarch Industries Corp. v. American Motorists Ins. Co., 276 F. Supp. 972 (S.D.N.Y. 1967), where the Court stated:

> "Another reason for denying the motion...is the futility of the proposed amendment." 276 F. Supp. 982

Similarly, 3 Moore's Federal Practice (2d Ed. 1948), ¶15.08 states that a Court is not required to grant an amendment which would be futile in effect. Accordingly, citing Foman v. Davis, 371 U.S. 178 (1962), it is observed in Moore's that "...the Supreme Court supports this position by indicating that

leave to amend need not be granted with respect to amendments which would not serve any purpose." 3 Moore's Federal Practice (2d Ed. 1948), ¶15.08 at 905.

Thus, notwithstanding the general rule that leave to amend should "be freely given when justice so requires", it could not be said that the lower Court's denial of plaintiffs' request to amend, in the case at bar, constituted a denial of justice or an abuse of discretion. This is particularly true in the instant matter where the proposed amendment would not have altered the lower Court's decision to grant summary judgment dismissing the complaint.

B. THE LOWER COURT CORRECTLY REFUSED THE INTRODUCTION OF ADDITIONAL EVIDENCE IN CONNECTION WITH PLAINTIFFS' MOTION TO REARGUE.

Plaintiffs (relying on Rule 59 of the Federal Rules of Civil Procedure) claim that the Court erred in denying plaintiffs' request to introduce new evidence on their motion to reargue.

Plaintiffs, of course, neglect to mention that Rule 9(m) of the General Rules of the United States Courts for the Southern and Eastern Districts of New York provides, in pertinent part:

> "(m) A notice of motion for reargument shall be served within ten (10) days after the filing of the court's determination of the original motion and shall be made returnable within the same period of time as required for the original motion. There shall be served with the notice of motion a memorandum setting forth concisely the matters or controlling decisions which counsel believes the court has overlooked ....No affidavits shall be filed by any party unless directed by the court." (Emphasis added)

In the instant matter the lower Court at no time directed that additional affidavits be filed and in fact plaintiffs never requested the right to do so. Accordingly, the lower Court was completely within its rights to disregard any affidavits submitted voluntarily.

Moreover, even if plaintiffs had the right to submit new material, it is clear that such new material must not have been known at the time of the original motion and plaintiffs must have been ignorant of the facts surrounding the new material. See Butler v. Pettigrew, 409 F.2d 1205 (7th Cir. 1969); and Moylan v. Siciliano, 292 F.2d 704 (9th Cir. 1961). Surely plaintiffs do not contend that the information contained in their own affidavits were unknown to them at the time of the making of the original motion for summary judgment. Moreover, what possible probative force could the transcript of the sales presentation have had upon whether or not each plaintiff was coerced into purchasing an unwanted product.

At best, the new material submitted was an improper, yet unsuccessful, attempt to undo the clear weight of evidence which unmasked plaintiffs' claim for what it really was, namely a consumer protection action rather than an anti-trust action.

Accordingly, the new material was rightfully rejected by the lower Court and is not properly a part of the record before this Court.

CONCLUSION

By virtue of all of the reasons stated herein, it is clear that the Orders of Judge Bruchhausen, dated March 5, 1975 and April 11, 1975, granting summary judgment dismissing the Amended Complaint and denying plaintiffs' request for reconsideration, should be affirmed in all respects.

Respectfully submitted,

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